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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 KELLY BOLDING, *et al.*,

8 Plaintiff,

9 v.

10 BANNER BANK,

11 Defendants.

Case No. C17-0601RSL

ORDER GRANTING IN PART
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

12
13 This matter comes before the Court on “Defendant Banner Bank’s Motion for Summary
14 Judgment.” Dkt. # 294. Banner asserts (A) that there is a lack of evidence showing that the vast
15 majority of the individuals who make up the class worked hours that were unpaid, (B) that the
16 class claims fail entirely because no reasonable jury could find that Banner knew or should have
17 known that mortgage loan officers (“MLOs”) were performing off-the-clock work, (C) that
18 plaintiff Kelly Bolding is judicially estopped from pursuing the wage and hour claims asserted
19 here, and (D) that there is no evidence of bad faith or intent that could support an award of
20 liquidated or double damages. Banner also seeks a declaration regarding the statutes of limitation
21 that apply to the claims of Banner’s Oregon employees.

22 Summary judgment is appropriate when, viewing the facts in the light most favorable to
23 the nonmoving party, there is no genuine issue of material fact that would preclude the entry of
24 judgment as a matter of law. The party seeking summary dismissal of the case “bears the initial
25 responsibility of informing the district court of the basis for its motion” (*Celotex Corp. v.*
26 *Catrett*, 477 U.S. 317, 323 (1986)) and “citing to particular parts of materials in the record” that

show the absence of a genuine issue of material fact (Fed. R. Civ. P. 56(c)). Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to designate “specific facts showing that there is a genuine issue for trial.” *Celotex Corp.*, 477 U.S. at 324. The Court will “view the evidence in the light most favorable to the nonmoving party . . . and draw all reasonable inferences in that party’s favor.” *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445, 450 (9th Cir. 2018). Although the Court must reserve for the trier of fact genuine issues regarding credibility, the weight of the evidence, and legitimate inferences, the “mere existence of a scintilla of evidence in support of the non-moving party’s position will be insufficient” to avoid judgment. *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1049 (9th Cir. 2014); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Factual disputes whose resolution would not affect the outcome of the suit are irrelevant to the consideration of a motion for summary judgment. *S. Cal. Darts Ass’n v. Zaffina*, 762 F.3d 921, 925 (9th Cir. 2014). In other words, summary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable fact finder could return a verdict in its favor. *Singh v. Am. Honda Fin. Corp.*, 925 F.3d 1053, 1071 (9th Cir. 2019).

Having reviewed the memoranda, declarations, and exhibits submitted by the parties,¹ and

¹ The Court has not considered the declarations from Lee Ann Anderson, Christopher Barnes, Sandra Borchers, or Tamara Encinas that were signed in 2018 and arguably should have been produced during discovery. Nor has the Court considered the unsigned and unverified discovery responses from Lucy Cleveland, John Ferry, Maria Garcia, Eduard Gubarik, and/or George Hogg. It has, however, considered the discovery responses that were recently signed or verified: the substance of those responses was timely disclosed.

With regards to the record reviews performed and compilations created by Reiley Colgan, Mark Miller, and Emily del Rosario, the underlying timekeeping, payroll, communication, and system records were produced by defendant in discovery, they are records of regularly conducted activities, the data is voluminous, the declarants thoroughly explain how and why they parsed and compared the records, and the resulting summaries appear to be both relevant and admissible. Colgan and Miller’s references to “unpaid work” are simply shorthands for “an instance where the date and time of log report activity was not reflected in the corresponding timekeeping record” (Dkt. # 314 at ¶ 15) or “an instance where the date and time of an email was not reflected in the corresponding timekeeping record and audit report” (Dkt. # 315 at ¶ 22), respectively. To the extent plaintiffs’ counsel utilized the Colgan and Miller

1 taking the evidence in the light most favorable to plaintiffs, the Court finds as follows:

2 **A. Uncompensated Hours for Individual Class Members**

3 To establish liability under federal and state law for unpaid wages, a plaintiff must
 4 generally prove that (1) he or she performed unpaid work and (2) the employer knew or should
 5 have known about it. *See Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014).
 6 Plaintiffs, on behalf of a class of mortgage loan officers (“MLOs”) who worked at Banner and/or
 7 its predecessor, seek to recover wages owed for unpaid compensable work at both straight and
 8 overtime rates. The conditional certification of a collective action under the Fair Labor
 9 Standards Act (“FLSA”) and the Rule 23 class certification were based on plaintiffs’ allegations
 10 that Banner had a unified, multi-prong policy designed to prevent MLOs from reporting and
 11 receiving compensation for all hours worked. Banner argues that the claims of the vast majority
 12 of the class should be dismissed because plaintiffs have neither obtained evidence from each
 13 class member regarding the existence or amount of unpaid work nor provided evidence that is
 14 probative of the experience of the entire class.

15 To the extent Banner is demanding individualized evidence of the existence and amount
 16 of unpaid hours for each MLO, the demand is premature. Which MLOs were deprived of
 17 straight or overtime pay and the amount of any related damages were never likely to be
 18 determined on a class-wide basis.² Those issues have now been bifurcated with regards to all
 19 plaintiffs, class, or collective members who are not called to testify in the liability phase.

20 _____
 21 summaries to make additional calculations, she may testify regarding the assumptions and evaluations
 22 she personally made. Whether, given the limited reviews performed by counsel and her staff, there are
 23 likely to be other evidence that MLOs engaged in compensable work that was not reflected in their
 24 timesheets can be determined by the fact finder and is not properly the subject of testimony from these
 25 witnesses.

26 The Court has considered the various reports prepared by plaintiffs’ economist, William Partin.

² In the class certification order, the Court noted that individualized inquiries would be necessary
 to determine “which class members incurred unreported overtime and the calculation of damages.” Dkt.
 # 135 at 10.

1 To the extent Banner is arguing that plaintiffs' evidence fails to raise a triable issue of
2 material fact regarding the existence of unpaid hours on a class-wide basis, the Court disagrees.
3 Plaintiffs have provided evidence that:

- 4 ● The duties and responsibilities of an MLO were demanding and required 24/7
5 responsiveness to customers. MLOs were subject to productivity quotas that
6 generally could not be reached working only 40 hours/week. The nature of the job
7 did not change when MLOs were reclassified from exempt to non-exempt.
- 8 ● The cell phone numbers of MLOs were posted on Banner's advertising, and their work
9 phones and emails were pushed to the MLOs' cell phones.
- 10 ● MLOs were generally assigned to branch offices so that they could assist walk-in
11 customers during bank hours. Other job functions had to be performed after hours.
- 12 ● Banner's predecessor had a policy requiring MLOs to return calls "timely 100% of the
13 time."
- 14 ● Banner had uniform, written policies requiring pre-approval for overtime and worked
15 breaks, requiring notification of missed breaks, and assuming that missed breaks
16 were voluntary unless Human Resources was informed in advance. There is
17 evidence that predicting when extra hours would be needed was functionally
18 impossible and that the persons responsible for approving overtime were not
19 generally available. Banner provided no information to the MLOs regarding what
20 constituted compensable work or to whom missed breaks had to be reported.
- 21 ● Before August 2017, Banner's timekeeping system prevented the accurate reporting of
22 time worked, simply reflecting a single entry in the form of either "8 hours" or
23 "8:00am to 4:00pm. There was no ability to indicate a missed break/lunch or to
24 record more than one start/stop block in a day. Other hourly employees were able
25 to enter multiple start and stop times and were trained to do so: MLOs were
26 excluded from this functionality.

- 1 ● MLOs were centrally managed, with their regional managers reporting directly to a
2 single head of Residential Lending/Mortgage Division. There is evidence that a
3 division head was charged with creating the policies for MLO compensation and
4 timekeeping and that his assistant individually reviewed MLO timesheets.
- 5 ● Banner's Rule 30(b)(6) declarant stated that, even if Banner learned that an employee
6 had worked through lunches that had been blocked out in the timekeeping records,
7 he or she would not be paid for those hours.
- 8 ● Internal Banner communications question timesheets that contain overtime hours. One
9 communication suggests that payroll declined to pay the reported overtime until it
10 obtained additional information and/or approvals.
- 11 ● When comparing sixteen months' worth of emails (August 2017 through November
12 2018) to the relevant timekeeping records, plaintiff identified 75 MLOs who
13 worked hours that were not reflected on their timecards (and were presumably not
14 paid). That represents 72% of the class members who were working during that
15 sixteen month period. Approximately 8 million emails from November 2018
16 through October 2020 were produced in November 2020: plaintiffs were not able
17 to review and compare them by the time their opposition was due on December 14,
18 2020.
- 19 ● A comparison of remote access records showed time logged into Banner's system that
20 exceeded a normal workday, was outside reported working hours, and/or occurred
21 when the MLO was on vacation or on a holiday. Sixty three of the 212 class
22 members had unrecorded remote access time.
- 23 ● A review of expense reports shows that 42 MLOs claimed expenses for work-related
24 activities (including weekday business lunches) that are not recorded in the
25 timekeeping records.
- 26 ● Approximately 30 class members have affirmatively stated that Banner discourages

1 MLOs from reporting all time worked.

2 Plaintiffs' claim of uncompensated work is not, as Banner would have it, based solely (or even
3 mostly) on the testimony of MLOs. Plaintiffs rely on Banner's written policies, internal
4 correspondence, and records to show the under-reporting of compensable hours and a hostility
5 toward overtime reporting. The class members' testimony confirms this evidence and suggests a
6 causal connection between Banner's policies and the under-reporting. A reasonable jury could
7 conclude that Banner discouraged the reporting of compensable hours and that its policies
8 resulted in widespread under-reporting of both straight and overtime hours.³

9 **B. Employer Knowledge**

10 In order to be liable for unpaid wages, Banner must have known or should have known
11 that MLOs were performing compensable work for which they were not being paid. Banner
12 argues that because it had an established procedure for reporting overtime hours and because it
13 would have had to comb through non-payroll records to determine whether a particular MLO
14 were working unreported hours, the evidence cannot support a finding that Banner knew or
15 should have known of uncompensated work. The Court disagrees. As discussed above, there is
16 evidence from which a reasonable jury could conclude that Banner affirmatively and
17 intentionally discouraged the reporting of compensable work. If that were the case, a reasonable
18 inference arises that defendant was aware that unreported work was occurring, but simply chose
19 to turn a blind eye. Other facts also support this inference, such as:

- 20 ● Banner's electronic record of MLOs' remote access to its system made evident work at

22 ³ In a footnote, Banner seeks summary dismissal of twenty-one opt-in plaintiffs' claims because
23 they either failed to respond to or affirmatively objected to discovery requests. Dkt. # 294 at 20 n.44.
24 Rule 37(d), on which defendant relies, authorizes sanctions "if . . . a party, after being properly served
25 with interrogatories under Rule 33 . . . , fails to serve its answers, objections, or written response."
26 Counsel's declaration makes clear, however, that the twenty-one individuals did serve objections or
responses, they were just not in the form that Banner preferred. Because defendant has not certified that
it conferred in good faith with plaintiffs about the perceived shortcomings before seeking terminating
sanctions (Rule 37(d)(1)(B)), the request for alternative relief is denied.

1 times that were not captured in the formulaic timekeeping records. There is also
2 evidence that Banner's remote access system auto-generated a report when certain
3 actions occurred, such as pulling a credit report, which would have notified
4 managers of after-hours work.

- 5 ● Regional Managers reviewed and approved MLO time sheets and communicated with
6 MLOs during times when the MLOs were off-the-clock.
- 7 ● Regional Managers approved expense reporting (accompanied by receipts), many of
8 which reflected hours worked during unpaid meal breaks or outside the hours
9 recorded on time cards.
- 10 ● Banner opted to keep payroll records that reflected exactly 8 hours of work per day,
11 usually on the exact same schedule. There is no indication that any manager,
12 Human Resources employee, or compensation specialist believed those records to
13 be accurate, and the jury could reasonably infer that the formulaic and
14 unchangeable entries were part of an effort to prevent accurate reporting and avoid
15 having to pay for all compensable work.
- 16 ● Certain MLOs state that they affirmatively told their managers about work-related
17 activities performed after hours and that they provided schedules/logs/production
18 reports showing work without breaks and outside normal business hours.
- 19 ● Certain MLOs state that their managers observed (if not demanded) off-the-clock work,
20 including meetings and work during lunch or before/after branch hours and work-
21 related meals and conferences.

22 **C. Judicial Estoppel**

23 Plaintiff Kelly Bolding filed for bankruptcy in May 2013. There is no evidence that she
24 was aware that she had wage and hour claims against Banner at the time. Her bankruptcy plan
25 was confirmed in September 2013. She made the required payments to her creditors and filed a
26 certification of completion in October 2017, obtaining a discharge in November 2017. This

lawsuit was filed in April 2017. She asserts that it did not occur to her than any new step related to her bankruptcy had to be undertaken other than to continue making her payments. After defendant broached the topic of judicial estoppel in this litigation (*see* Dkt. # 87 at 33 n.13), Bolding filed a motion to reopen with amended schedules. The bankruptcy proceeding remains open, and that court will have the opportunity to determine what to do with any money Bolding obtains from this litigation. In these circumstances the Court finds that the initial error was inadvertent, the debtor has not gained an unfair advantage, there is no chance that the bankruptcy court will be deceived, and there is no threat to judicial integrity. *See Ah Quin v. County of Kauai Dep't of Transp.*, 733 F.3d 267, 273-76 (9th Cir. 2017). Judicial estoppel does not apply.

D. Good Faith/Lack of Intent

Banner argues that it acted in good faith with regards to the wages paid its MLOs, and that the Court should therefore exercise its discretion to award no liquidated damages under the FLSA, 29 U.S.C. § 260. Similarly, defendant argues that it did not know or intend that MLOs would under-report their hours, precluding an award of double damages under the Washington wage laws, RCW 49.52.070. If the jury were to find that Banner affirmatively discouraged MLOs from reporting all hours worked, it could also find that Banner was attempting to evade its responsibilities under the FLSA and intended to suppress overtime claims. Given the existing record, a determination regarding Banner's subjective good faith or intent cannot be made as a matter of law.


F. Oregon Statutes of Limitation

Oregon has a six-year statute of limitations for claims based on the taking or detaining of wages, Or. Rev. St. § 12.080(4), but a two-year limitations period for “[a]n action for overtime or premium pay or for penalties or liquidated damages for failure to pay overtime or premium pay,” Or. Rev. Stat. Ann. § 12.110(3). Neither *res judicata* nor Oregon case law require the application of any other limitations periods. Banner is entitled to a declaration that the Oregon subclass claims are limited to six years for regular wage claims and two years for overtime wage

1 claims.

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3 For all of the foregoing reasons, Banner's motion for summary judgment (Dkt. # 294) is
4 GRANTED in part and DENIED in part.

5 Dated this 13th day of September, 2021.

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7 Robert S. Lasnik
8 United States District Judge
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